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December 15, 1978

His Excellency, Meldrim Thomson, Jr.  
and the Honorable Council

Your Excellency and Members of the Council:

At the request of the Governor, I have reviewed certain procedures followed at the meeting of the Governor and Council of December 13, 1978 relative to confirmation of certain nominees to positions inside state government. It is my understanding that you seek my opinion on essentially three questions;

- (1) Can a Councilor offer a nomination of an individual for a position or does that power reside exclusively in the Governor;
- (2) When the Council is considering a nomination, following a motion to confirm by a Councilor, can the Governor second that motion so as to put the matter before the Council for vote; and
- (3) What is the effect of a vote on confirmation when a majority of those Councilors voting on the question is less than a majority of the full Council.

Part 2, Article 46 of the Constitution of New Hampshire, dealing with the nomination and appointment of officers, states that all officers there enumerated " . . . shall be nominated and appointed by the Governor and Council . . . " None of the officers there enumerated were nominated by a Councilor at the December 13, 1978 meeting and, accordingly, I will not review the ability of a Councilor to make such a nomination. All other appointments subject to Governor and Council nomination would be covered by RSA 21:31-a which states "The phrase 'governor and council' shall mean the governor with the advice and consent of



the council." Such language clearly contemplates the Governor as the source of nomination for those statutory offices. However, there have been instances where a governor has permitted a councilor to offer a nomination. In those instances, where the governor has in effect thus delegated his nominating authority, I think it is possible for a councilor to offer a nomination.

The situation in regard to the second question set forth above does not permit as precise a response. There is no requirement, either constitutionally or statutorily, for a nomination made by the Governor to be moved and seconded by a member of the Council prior to a vote on confirmation being taken. There has, however, evolved a practice both in this Council and its predecessor Councils, for this moving and seconding process to be followed. To this practice, this Governor and his predecessor Governors have acquiesced. There is no necessity for this practice and the Governor, should he choose not to follow this practice, could simply require a roll call vote on the nomination.

I think it appropriate here to make a general observation concerning the relationship of the Governor and the Executive Council in the nomination and confirmation process. In considering a nomination, the Governor and Council do not act as one six member body but rather as two bodies, the Governor and the five member Executive Council, Part 2, Article 47, RSA 21:31-a. Given the moving and seconding process followed by the Executive Council in its consideration of confirmations, that process is exclusively in the province of the Executive Council. Accordingly, it is my opinion that the Governor cannot be part of that process since he is not part of that body. Therefore, the seconding by a Governor of a motion to confirm by a Councilor would not work, under the process outlined above, to present the question to the Council.

Reviewing the action at the December 13th meeting, it is my opinion that in those instances when a Councilor moved for confirmation of a nomination and the Governor seconded the same, those nominations were not properly before the Council for confirmation in the absence of the Governor calling for a vote on confirmation himself and asking for a vote.

On the third question, that is, the effect of a vote of the Council where less than a majority of the Councilors present vote on the question but a majority of those actually voting come out on one side or the other of the question, that matter has already been decided by the New Hampshire Supreme Court in the Opinion of the Justices on June 29, 1953, reported at 98 N.H. 530.

"That a majority of the Council constitutes a quorum may be inferred from the Constitution. Arts. 46, 62, supra. See also, R. L., c. 7, s. 15; Despatch Line of Packets v. Bellamy Man Co. 12 N.H. 205, 226. It does not follow however that affirmative action by a majority of the Councilors is necessary to the exercise of the powers of the Council with respect to appointments provided for by statute where its advice, approval or consent is necessary. The powers of the Council reside in the majority, and action taken by any duly convened meeting at which a quorum is present constitutes the action of the Council even though supported by less than a majority of the Council, or less than a majority of the Councilors present, provided a majority of the votes cast support the action. Attorney-General v. Shepard, supra; Attorney-General v. Remick, 71 N.H. 480, 483.

Thus if Councilors present should choose to remain silent, or otherwise abstain from voting, their action will not defeat the action of those who vote, but will be taken as acquiescence or concurrence in the action supported by the majority of votes cast, whether the same be in the affirmative or negative. Attorney-General v. Bickford, supra. "Silence of a part of the members not voting cannot be counted against the express voice of another part voting." Richardson v. Society, 58 N.H. 187, 188. See also 4 McQuillin, Municipal Corporations (3rd ed.), s. 13.32; 5 Fletcher, Cyc. Corp. (perm. ed.), s. 2020; Sommers v. Bridgeport, 60 Conn. 521; First Parish in Sudbury v. Stearns, 21 Pick. (Mass.) 148, 154.

It is contemplated by the Constitution that members of the Council will ordinarily express an opinion or cast a vote one way or the other, upon matters coming before them in the course of their duties, at least where there is no disqualification to participate. Const., Pt. II, Arts. 62-64. If they choose nevertheless to do otherwise, they are in no position to stultify or obstruct the action of others in the performance of official duty. Attorney-General v. Shepard, supra."

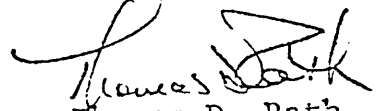
The Court, therefore, said that the constitutional language requiring confirmation by a "majority" of the Council does not mean that every nomination considered must have three affirmative votes to secure confirmation. What the Court said was that the language of the Constitution requires only that a majority of those voting agree to a nomination in order to effect the confirmation.

On this point, I note that the Court specifically limited its holding to statutory offices as opposed to those constitutional offices outlined in Part 2, Article 46 of the Constitution. The Constitution clearly requires that confirmation to those Part 2, Article 46 offices can only be obtained by at least three affirmative votes.

In summary, it is my opinion that a Councilor may nominate someone for a statutory state office when the Governor so permits. When this is done, however, confirmation does not result until and unless the Governor casts an affirmative vote in favor of the nomination following affirmative action by the Council. The Governor may not second a motion for confirmation by a Councilor. Confirmation for statutory offices requires only affirmative votes by a majority of the Council actually voting on the question, not a majority of the entire Council. Of course, should a quorum of the Council not be present at any meeting, confirmation would not result in any case.

I trust this is responsive to your inquiry. I stand ready to meet and discuss these matters with you further at your convenience.

Respectfully,

  
Thomas D. Rath  
Attorney General